



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 15, 16, and 37

[FAR Case 2018-016; Docket No. FAR-2018-0016, Sequence No. 1]

RIN 9000-AN75

Federal Acquisition Regulation: Lowest Price Technically Acceptable Source Selection Process

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which specifies the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and requires procurements predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018-016 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2018-016". Select the link "Comment Now" that corresponds with "FAR Case 2018-016". Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2018-016" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR Case 2018-016", in all correspondence related to this case. All comments received will be posted without change to [http:// www.regulations.gov](http://www.regulations.gov), including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check

www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949 or michaelo.jackson@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite "FAR Case 2018-016".

SUPPLEMENTARY INFORMATION:

I. Background

Section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232, 41 U.S.C. 3701 Note) makes it the policy of the Government to avoid using Lowest Price Technically Acceptable (LPTA) source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process. The section requires that LPTA source selection criteria be used only when: (1) an executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers; (2) the executive agency would

realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal; (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal; (4) the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency; (5) the contracting officer has included a justification for the use of an LPTA evaluation methodology in the contract file; and (6) the executive agency has determined that the lowest price reflects total costs, including for operations and support.

Additionally, section 880 requires that the use of LPTA source selection criteria be avoided, to the maximum extent practicable, in procurements that are predominantly for the acquisition of: information technology services; cybersecurity services; systems engineering and technical assistance services; advanced electronic testing; audit or audit readiness services; health care services and records; telecommunications devices and services; or other knowledge-based professional services; personal protective

equipment; or, knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

II. Discussion and Analysis

This proposed rule would require contracting officers to: ensure procurements meet the criteria of section 880 before including LPTA source selection criteria in solicitations; document the contract file with a justification for the use of the LPTA source selection process, when applicable; and, to avoid, to the maximum extent practicable, the use of LPTA source selection criteria in procurements that are predominantly for the supplies and services identified in section 880. This rule does not address the applicability of section 880 to the Federal Supply Schedules Program (Schedules Program). GSA will separately address the applicability of section 880 to the Schedules Program.

In addition, section 880 does not apply to DoD. Instead, section 813 of the NDAA for FY 2017 (10 U.S.C. 2305 Note) and section 822 of the NDAA for FY 2018 (10 U.S.C. 2305 Note) establish a similar, but not the same, set of criteria for DoD procurements to meet in order to use LPTA source selection criteria in solicitations. These

sections are being implemented in a separate Defense Federal Acquisition Regulation Supplement case (2018-D010).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT, or for commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

The rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) are proposing to revise the Federal Acquisition Regulation (FAR) to:

- Specify the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and,
- Require procurements predominantly for the acquisition of certain services or supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

The objective of the rule is to avoid using LPTA source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process. The legal basis for the rule is section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). The rule does not cover DoD, which has already been covered by section 813 of the NDAA for FY 2017 and section 822 of the NDAA for FY 2018.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The rule primarily affects internal Government requirements determination decisions, acquisition strategy decisions, and contract

file documentation requirements. The Government does not collect data on the total number of solicitations issued on an annual basis that do or do not specify the use of the LPTA source selection process. However, the Federal Procurement Data System (FPDS) provides the following information for fiscal year 2018:

- Federal competitive contracts and orders awarded using FAR parts 13, 15, or 16.5 procedures. In FY 2018, the Federal Government, excluding DoD, awarded approximately 82,337 new contracts and orders using the competitive procedures of FAR 13, 15, or 16.5. This data excludes acquisitions for the supply/service categories identified in section 880(c) of the NDAA for FY 2019. Of the 82,337 contracts and orders, approximately 69 percent (or 56,622 contracts and orders) were awarded to approximately 27,029 unique small businesses. It is important to note that FPDS does not collect data on solicitations, but does collect information on competitively awarded contracts using various FAR procedures. Therefore, this data represents contracts that were awarded using LPTA and tradeoff source selection procedures.

- Federal competitive contracts and orders awarded for certain services and supplies. In FY 2018, the Federal Government, excluding DoD, awarded approximately 22,581 new contracts and orders potentially for the supplies and services identified in section 880(c) of the NDAA for FY 2019 using the competitive procedures of FAR parts 13, 15, and 16.5, of which approximately 63 percent (or 14,285 contracts and orders) were awarded to approximately 10,129 unique small businesses.

The proposed rule does not impose any Paperwork Reduction Act reporting or recordkeeping requirements on any small entities. The rule may impact some small businesses. Some offerors may need to change the structure of their quotes or offers to conform to instructions and corresponding evaluation criteria in solicitations that use tradeoff source selection criteria, as LPTA source selection criteria is now unavailable for use in some circumstances. This impact, which represents the incremental difference between preparing a noncomplex proposal to be evaluated using LPTA criteria and preparing the additional information necessary to evaluate a proposal using tradeoff criteria, is expected to be minimal.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018-016) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 12, 13, 15, 16, and 37

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 12, 13, 15, 16 and 37 as set forth below:

1. The authority citation for 48 CFR parts 12, 13, 15, 16 and 37 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. Revise section 12.203 by redesignating the text as paragraph (a) and adding paragraph (b) to read as follows:

12.203 Procedures for solicitation, evaluation, and award.

* * * * *

(b) Contracting officers shall ensure the criteria at 15.101-2(c) are met when using the lowest price technically acceptable source selection process.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

3. Amend section 13.106-1 by adding paragraphs (a)(2)(i) and (a)(2)(ii) to read as follows:

13.106-1 Soliciting competition.

(a) * * *

(2) * * *

(i) Except for DoD, contracting officers shall ensure the criteria at 15.101-2(c)(1)-(5) are met when using the lowest price technically acceptable source selection process.

(ii) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101-2(d).

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4. Amend section 13.106-3 by-

a. In paragraph (b)(3), removing "statements-" and adding "statements, when applicable-" in its place;

b. In paragraph (b)(3)(i), removing "; or" and adding ";" in its place;

c. In paragraph (b)(3)(ii), removing "." and adding "; and"

d. Adding paragraph (b)(3)(iii).

The addition reads as follows:

13.106-3 Award and documentation.

* * * * *

(b) * * *

(3) * * *

(iii) Except for DoD, when using lowest price technically acceptable source selection process, justifying the use of such process.

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PART 15-CONTRACTING BY NEGOTIATION

5. Amend section 15.101-2 by adding paragraphs (c) and (d) to read as follows:

15.101-2 Lowest price technically acceptable source selection process.

* * * * *

(c) Except for DoD, in accordance with section 880 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232, 41 U.S.C. 3701 Note), the lowest price technically acceptable source selection process shall only be used when—

(1) The agency can comprehensively and clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(2) The agency would realize no, or minimal, value from a proposal that exceeds the minimum technical or performance requirements;

(3) The agency believes the technical proposals will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(4) The agency has a high degree of confidence that reviewing the technical proposals of all offerors would not

result in the identification of characteristics that could provide value or benefit to the agency;

(5) The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired; and

(6) The contracting officer documents the contract file describing the circumstances that justify the use of the lowest price technically acceptable source selection process.

(d) Except for DoD, in accordance with section 880 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232, 41 U.S.C. 3701 Note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominantly for the acquisition of—

(1) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;

(2) Personal protective equipment; or

(3) Knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

PART 16-TYPES OF CONTRACTS

6. Amend section 16.505 by-

- a. Removing from the end of paragraph (b)(1)(ii) "must-" and adding "shall-" in its place;
- b. Removing from paragraph (b)(1)(ii)(D) "contract; and" and adding "contract;" in its place;
- c. Removing from paragraph (b)(1)(ii)(E) "decision." and adding "decision;" in its place;
- d. Adding paragraphs (b)(1)(ii)(F) and (b)(1)(ii)(G); and
- e. Adding paragraph (b)(7)(iii).

The additions read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(F) Except for DoD, ensure the criteria at 15.101-2(c)(1)-(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101-2(d).

* * * * *

(7) * * *

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

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PART 37 - SERVICE CONTRACTING

7. Amend section 37.102 by adding paragraph (j) to read as follows:

37.102 Policy.

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(j) Except for DoD, see 15.101-2(d) for limitations on the use of the lowest price technically acceptable source selection process to acquire certain services.

Billing Code: 6820-EP

[FR Doc. 2019-20798 Filed: 10/1/2019 8:45 am; Publication Date: 10/2/2019]